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No. 14-916

IN THE

Supreme Court of the United States

KINGDOMWARE TECHNOLOGIES, INC.,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Federal Circuit

BRIEF OF *AMICI CURIAE* PARALYZED VETERANS OF AMERICA, VIETNAM VETERANS ASSOCIATION, THE MILITARY OFFICERS ASSOCIATION OF AMERICA AND THE NATIONAL VETERANS LEGAL SERVICES PROGRAM IN SUPPORT OF PETITIONER

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News Reslease, Bureau of Labor Statistics, U.S. Dep't of Labor, Employment Situation of Veterans–2014 (Mar. 18, 2015), *available at* http://www.bls.gov/news.release/pdf/vet.pdf 17

Amy G. Cox & Nancy Y. Moore, *Improving Federal and Department of Defense Use of Service-Disabled Veteran-Owned Businesses* (2013), *available at* http://www.rand.org/content/dam/rand/pubs/research_reports/RR300/RR322/RAND_RR322.pdf 18, 19

Dep't of Veterans Affairs, *Doing Business with VA* (2015), *available at* http://www.va.gov/osdbu/docs/DoingBusinessWithVA_ReferenceGuide.pdf 23

Dep't of Veterans Affairs, *Vendor Information Pages (VIP)*, http://www.VetBiz.gov (last visited Aug. 20, 2015) 22

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2A Singer & Singer, *Statutes and Statutory Construction* (7th ed. 2014) 9

INTERESTS OF *AMICI CURIAE*[1]

Amici curiae, as described below, are groups that represent and advocate in support of our nation's veterans. *Amici* have a strong interest in the proper application of statutes adopted by Congress to assist veterans by providing preferences that remove barriers veterans face as they return to civilian life. Those interests are implicated by the decision of the Federal Circuit, which effectively interprets 38 U.S.C. § 8127(d) to eliminate the mandates that Congress concluded are necessary to increase contracting opportunities for our nation's veterans.

Paralyzed Veterans of America (PVA) is a non-profit veteran service organization founded in 1946 and chartered by the Congress of the United States. See 36 U.S.C. §§ 170101-170111 (2006). PVA has more than 19,000 members who are veterans of the Armed Forces of the United States and suffer from an injury or disease of the spinal cord. PVA's statutory purposes include: acquainting the public with the needs and problems of paraplegics; promoting medical research in the several fields connected with injuries and diseases of the spinal cord; and advocating and fostering complete and effective reconditioning programs for paraplegics. PVA carries out these purposes by operating various beneficial programs, such as providing free representation before the Department of Veteran Affairs (VA) to its

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[1] Pursuant to Rule 37.6, *amici* state that no counsel for a party authored this brief in whole or in part and no person other than *amici*, their members, or counsel, made a monetary contribution to the preparation or submission of this brief. Letters of blanket consent to the filing of *amicus* briefs by both petitioner and respondent have been lodged with the Clerk of Court pursuant to Rule 37.3.

members and other veterans, dependents, and survivors who have filed claims with the agency seeking benefits authorized by Congress. PVA also provides free legal services to members and other veterans, dependents, and survivors seeking judicial review of agency benefit decisions.[2]

Vietnam Veterans of America (VVA) is a congressionally-chartered national veteran service organization that is expressly dedicated to ensuring and promoting the rights of Vietnam-era veterans. See Pub. L. No. 99-318, 100 Stat. 474 (1986); 36 U.S.C. §§ 230501-230513. VVA has over 75,000 individual members, 48 state councils, and 650 local chapters. In furtherance of VVA's guiding principle that "Never again will one generation of veterans abandon another," VVA provides broad assistance to *all* veterans and their families, both members and non-members. VVA assists veterans in the prosecution of claims for benefits by providing them with pro bono legal representation before the VA, the Board of Veterans' Appeals and on appeal to the United States Court of Appeals for Veterans Claims. VVA's advocacy on behalf of individual veterans and veterans as a group extends to the legislative arena and broad-impact litigation.

The Military Officers Association of America (MOAA) was founded in 1929. With over 390,000 members today, it is the country's largest professional association for military officers and the fourth largest veterans' association. Membership is

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[2] PVA also is a leading advocate for (i) quality health care for its members, (ii) research and education addressing spinal cord injury and dysfunction, (iii) benefits available as a result of its members' military service, and (iv) civil rights and opportunities that maximize the independence of its members.

open to active duty, National Guard, Reserve, retired and former commissioned officers and warrant officers of the Army, Marine Corps, Navy, Air Force, Coast Guard, Public Health Service and National Oceanic and Atmospheric Administration. MOAA's mission is to advocate for our military community and connect it to the Nation it serves. MOAA advocates for the needs of uniformed services personnel, their families, military retirees, veterans, and surviving spouses and provides information, assistance, and advice, including career transition services, military benefits counseling. member products, educational assistance to children of military families (including families of all ranks, officer and enlisted), and strong involvement in military professionalism activities.

The National Veterans Legal Services Program (NVLSP) is an independent nonprofit organization that has worked since 1980 to ensure that the United States government provides our Nation's 22 million veterans and active duty personnel with the federal benefits they have earned through their service to our country. NVLSP accomplishes its mission through litigation; administrative representation of veterans and active duty personnel before the VA and the military departments on claims for benefits; publication of materials that provide veterans, their families, and their advocates with the information necessary to obtain the benefits to which they are entitled; and service as a national support center that recruits, trains and assists thousands of lawyer and non-lawyer advocates to represent veterans and active duty personnel on claims for benefits.

The decision of the Federal Circuit below affects small businesses owned by veterans—including disabled veterans—by limiting their ability to

compete for government contracts with the VA. As this Court has explained, programs providing preferences to veterans traditionally are "designed to reward veterans for the sacrifice of military service, to ease the transition from military to civilian life, to encourage patriotic service, and to attract loyal and well-disciplined people to [public] service." *Personnel Adm'r of Mass.* v. *Feeney*, 442 U.S. 256, 265 (1979). *Amici* have a strong interest in ensuring that the statutory preferences provided to veterans and disabled veterans by Congress are not eliminated or eroded by the decision of the Federal Circuit.

INTRODUCTION AND SUMMARY

Veterans make extraordinary sacrifices in military service and face extraordinary challenges in returning to civilian life. Although they have made significant sacrifices to provide service to their country, these veterans often face indifference or discrimination in pursuing civilian employment and business opportunities. The United States has recognized its obligation to assist these veterans, including those with service-connected disabilities, in competing for government contracts.

In adopting 38 U.S.C. § 8127, Congress established an overarching goal to "increase contracting opportunities for small business concerns owned and controlled by veterans and . . . veterans with service-connected disabilities." 38 U.S.C. § 8127(a)(1). To reach this long-term goal, Congress granted the Department of Veterans Affairs (VA) new tools to improve contracting opportunities for veterans. In subsections (b) and (c), Congress granted the VA *discretionary* authority to award certain sole source contracts to veteran-owned small businesses. *Id.* § 8127(b)-(c). In Section 8127(d), Congress imposed a

mandatory mechanism for VA contracting officers to "award contracts on the basis of competition restricted to small business concerns" where two or more veteran-owned businesses would submit offers and where the award could be made at "a fair and reasonable price that offers best value to the United States." *Id.* § 8127(d). Congress imposed that mandate on the VA because prior legislative efforts that granted contracting officers discretion proved inadequate to the task of increasing opportunities for veteran-owned businesses.

In this case, the judgment of the Federal Circuit severely limits the non-discretionary obligation in Section 8127(d). In support of that ruling, the United States has argued that interpreting Section 8127(d) to impose a mandate on contracting officers is (1) unnecessary because the VA has been meeting annual contracting goals, and (2) unwise because it would be "markedly less efficient" and would require contracting officers to conduct "market research" to determine whether "two or more veteran-owned small businesses" can provide products "at a fair and reasonable price." Brief in Opposition 16. These arguments should be rejected.

First, as detailed by Petitioners, and as discussed below, the language, structure and history of Section 8127 confirm that Congress, in Section 8127(d), imposed a mandate on contracting officers designed to benefit veteran-owned small businesses. The mandate imposed by Section 8127(d) is not limited by the annual participation goals set by the Secretary. Those annual goals do not impose a "ceiling" on participation by veterans, but instead set an annual "floor" on participation as part of Congress' overarching goal in Section 8127(a) to "increase contracting opportunities" for small business

concerns owned by veterans and veterans with service-connected disabilities. Section 8127(d)'s plain language requires that contracting officers pursue that overarching goal by imposing a mandatory mechanism that benefits veteran-owned businesses while protecting competing fiscal interests associated with contracting by the VA.

Second, Congress imposed the mandate under Section 8127(d) with the understanding that the burdens faced by veterans upon their return to civilian life are substantial. Contrary to the United States' position, Congress' principal concern was to provide a preference that would ameliorate the burdens faced by veteran-owned businesses. Congress adopted that preference notwithstanding the fact that a mandatory mechanism might reduce the administrative flexibility of contracting officers. On this point, the United States overstates the burden imposed by the mandate in Section 8127(d) on contracting officers. In all events, it would be inappropriate to eliminate that mandatory mechanism even if doing so might be more convenient for the VA's contracting officers because Congress, through Section 8127(d), resolved the competing policy interests in favor of veteran-owned businesses rather than administrative convenience. To the extent that the government contends that Congress struck the wrong balance, the remedy it seeks lies not with the courts, but with Congress.

ARGUMENT

I. THE LANGUAGE, STRUCTURE AND HISTORY OF SECTION 8127 REFLECT THAT SUBSECTION (D) IMPOSES A MANDATORY PREFERENCE FOR VETERAN-OWNED BUSINESSES.

A. The Language And Structure Of Section 8127 Confirm The Mandatory Nature Of The Obligations Under Subsection (d).

1. The governing principles of statutory construction are well established. "It is axiomatic that '[t]he starting point in every case involving construction of a statute is the language itself.'" *Landreth Timber Co.* v. *Landreth*, 471 U.S. 681, 685 (1985) (quoting *Blue Chip Stamps* v. *Manor Drug Stores*, 421 U.S. 723, 756 (1975) (Powell, J., concurring)); accord *Hughes Aircraft Co.* v. *Jacobson*, 525 U.S. 432, 438 (1999). "When interpreting a statute, we must give words their 'ordinary or natural' meaning." *Leocal* v. *Ashcroft*, 543 U.S. 1, 9 (2004); see also *Barber* v. *Gonzales*, 347 U.S. 637, 641 (1954) ("[S]tatutory language should be interpreted whenever possible according to common usage."). In assessing the statutory text, this Court "consider[s] not only the bare meaning of the word[s] but also [their] placement and purpose in the statutory scheme," *Bailey* v. *United States*, 516 U.S. 137, 145 (1995), as well as "the provisions of the whole law" including "'its object and policy,'" *Dole* v. *United Steelworkers of Am.*, 494 U.S. 26, 35 (1990).

2. Application of these principles demonstrates that Section 8127(d) imposes a mandate on contracting officers for the benefit of veteran-owned small businesses.

First, the plain language of Section 8127(d) provides that a contracting officer of the VA

> *shall* award contracts on the basis of competition restricted to small business concerns owned and controlled by veterans if the contracting officer has a reasonable expectation that two or more small business concerns owned and controlled by veterans will submit offers and that the award can be made at a fair and reasonable price that offers best value to the United States.

38 U.S.C. § 8127(d) (emphasis added). The use of the term "shall" reflects that Congress intended to impose a mandatory mechanism. Indeed, this Court has explained, repeatedly, that the word "shall" is ordinarily "the language of command." *Alabama* v. *Bozeman*, 533 U.S. 146, 153 (2001); see *Anderson* v. *Yungkau*, 329 U.S. 482, 485 (1947); *Escoe* v. *Zerbst*, 295 U.S. 490, 493 (1935); see also *Lexecon Inc.* v. *Milberg Weiss Bershad Hynes & Lerach*, 523 U.S. 26, 35 (1998) ("the mandatory 'shall,' which normally creates an obligation impervious to judicial discretion"); cf. *United States* v. *Monsanto*, 491 U.S. 600, 607 (1989) (explaining that the by using the phrase "shall forfeit," "Congress could not have chosen stronger words to express its intent that forfeiture be mandatory").

The mandatory nature of Section 8127(d) is confirmed by the statute's use of the permissive word "may" in subsections (b) and (c) of the statute. The use of both "shall" and "may" in closely related, but distinct, parts of Section 8127 reflects that Congress intended to differentiate between these subsections. Indeed, this Court has explained that when the same statute uses both "may" and "shall" in related sections, the normal inference is that each is used in its usual sense and that the former is permissive, the

latter mandatory. See *Anderson*, 329 U.S. at 485; *United States ex rel. Siegel* v. *Thoman*, 156 U.S. 353, 359 (1895); *Lopez* v. *Davis*, 531 U.S. 230, 241 (2001).

3. The prefatory clause to subsection (d) does not undercut the mandatory nature of the obligation imposed on contracting officers. The clause provides:

> *Except as provided in subsections (b) and (c), for purposes of meeting the goals under subsection (a),* and in accordance with this section, a contracting officer of the Department shall award contracts on the basis of competition restricted to small business concerns owned and controlled by veterans . . . .

38 U.S.C. § 8127(d) (emphasis added). The first part of the prefatory clause resolves any potential conflict between application of the discretionary obligations in subsections (b) and (c) and the mandatory obligation in subsection (d). That clause reflects that contracting officers are not obligated to apply the preference for veteran-owned business in subsection (d) if they have chosen to apply the *discretionary* preferences for veteran-owned businesses under subsections (b) or (c).

The language that follows—"for purposes of meeting the goals under subsection (a)"—does not eliminate the mandatory nature of the obligation imposed on contracting officers. That introductory clause is a statement of purpose that does not "limit or expand the scope of [an] operative clause." *Dist. of Columbia* v. *Heller*, 554 U.S. 570, 578 (2008); see *Yazoo & Miss. Valley R.R.* v. *Thomas*, 132 U.S. 174, 188 (1889); see also 2A Singer & Singer, *Statutes and Statutory Construction* § 47:4 (7th ed. 2014). As such, the legislative statement describing one of the "purposes" of subsection (d) does not "limit or expand"

the operative, mandatory scope of subsection (d), which requires that VA "shall award" contracts pursuant to the criteria in subsection (d).

The United States reads this prefatory language to mean that subsection (d)'s obligations apply only *if* necessary to meet "'the goals under subsection (a).'" Brief in Opposition 14. That argument is mistaken. First, the government overlooks the primary, overarching congressional goal reflected in subsection (a): "to increase contracting opportunities for small business concerns owned and controlled by veterans and . . . veterans with service-connected disabilities." 38 U.S.C. § 8127(a)(1); *see also* H.R. Rep. No. 109-592, at 14 (2006) (stating that the Act was intended to "improve the competitive status of small businesses owned by veterans and service-disabled veterans when competing for VA contracts"). To serve that principal goal, Congress adopted a mandatory mechanism that would provide a preference to veteran-owned small business under subsection (d).

In so doing, Congress set no "ceiling" on the annual goals "for each fiscal year for participation in Department contracts" under subsection (a)(1)(A) or (a)(1)(B). To the contrary, Congress set only a floor on participation so that the "goal for a fiscal year for participation under paragraph (1)(B) shall be not less than the Government-wide goal for that fiscal year for participation by small business concerns owned and controlled by veterans with service-connected disabilities under section 15(g)(1) of the Small Business Act." 38 U.S.C. § 8127(a)(3). Indeed, the United States has acknowledged that these fiscal year goals do not establish a "ceiling" on participation by veteran-owned businesses because Congress intended that Section 8127 would cause "the VA to

contract with small businesses owned by veterans (and service-disabled veterans) *at or above* the percentage rates the Secretary seeks to achieve." Brief in Opposition 13 (emphasis added).

Consistent with that acknowledgement, the annual goals for participation by eligible veterans set by the VA Secretary have increased over time, and the Secretary has asserted that VA has exceeded its goals in each of these years. See Pet. App. 9a. The VA has not alleged that exceeding these goals has interfered in any way with its administration of the statutory scheme or with its other statutory duties. Indeed, the legislative history indicates that Congress intended that VA would meet and exceed the numerical goals of § 8127(a). For example, Representative Boozman, the Chair of the Economic Opportunity Subcommittee of the House Veterans Affairs Committee, and the principal sponsor of the House legislation that eventually became law, said in a floor statement just before final passage, "[t]his bill provides the Department of Veterans Affairs with the tools and requisite authorities to not only meet the goal but to exceed the goal." See 152 Cong. Rec. H9017 (daily ed. Dec. 8, 2006) (statement of Rep. Boozman).

Finally, interpreting subsection (d) to impose a mandatory mechanism would not undermine the importance of the goal-setting requirement in subsection (a). To the contrary, the numerical goals established pursuant to Section 8127(a) would continue to serve as a benchmark for determining whether to exercise discretionary contracting procedures provided under Section 8127(b)-(c) and, more generally, for assessing the success of discretionary and mandatory obligations under Section 8127 in meeting Congress' primary goal "to increase contracting opportunities for small business

concerns owned and controlled by veterans and . . veterans with service-connected disabilities." 38 U.S.C. § 8127(a)(1).

B. The Statutory History Of Section 8127 Confirms That Congress Intended To Impose A Mandatory Mechanism To Benefit Veteran-Owned Businesses.

The statutory history of Section 8127 also confirms that Congress' use of the term "shall" in subsection (d) was designed to impose a mandatory mechanism.

Congress first acted to assist veterans in this regard in 1999, when it amended the Small Business Act to establish an aspirational goal of awarding three percent of all federal government contracts to small businesses owned by veterans with service-connected disabilities. See 15 U.S.C. § 644(g). In practice, however, federal agencies fell short of this goal, awarding only 0.24% of federal contract funds to eligible veterans for the 2001 fiscal year. Pet. App. 4a. Indeed, the VA itself awarded only 0.1% of its contracts to eligible veterans in 2000, 0.2% in 2001, and 0.6% in 2002. *Id.* at 4a-5a.

Congress amended the Small Business Act in 2003, granting discretionary authority to federal contracting officers to award sole-source contracts of restricted dollar amounts to eligible service-disabled veterans or to restrict competition in accordance with the Rule of Two. 15 U.S.C. § 657f. This discretionary authority again failed to achieve the goal of the Small Business Act to award 3% of government contacts to eligible veterans. Only 0.605% of federal government contracts went to eligible veteran-owned small businesses in 2005. Pet. App. 5a.

Recognizing that the use of aspirational goals and discretionary authority had failed to provide

meaningful assistance to eligible veterans, Congress acted again in 2006, making the preference for veteran-owned small businesses in Section 8127(d) mandatory rather than discretionary. Congress focused the scope of these mandatory preferences to include only VA contracting opportunities, and expanded eligibility to include both small businesses owned by veterans generally, and small businesses owned by veterans with service-connected disabilities. See 38 U.S.C. § 8127(a), (d).

Congress' proposal met with resistance from the VA. The earliest version of H.R. 3082, as introduced in the House in 2005, included the term "shall" in the precursors to § 8127(b), (c), and (d). After a proposed amendment, the VA Deputy Secretary, Gordon Mansfield, testified before Congress in 2006 regarding the use of the terms "may" and "shall," and requested that the terms of the amendment be changed to eliminate the mandatory "shall."[3] Before passage, Congress amended the bill to allow VA discretion in subsections (b) and (c), but retained the mandatory "shall" in subsection (d). These provisions later were enacted into law as S.3421, and codified as 38 U.S.C. § 8127. These modifications of the legislative language show that Congress was well aware of the differences between "may" and "shall," and that these differences were intentional.

In *Hilton* v. *Sullivan*, 334 U.S. 323 (1948), this Court rejected an analogous argument against a statute that granted preferential treatment to veterans. There, this Court rejected a challenge to

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[3] *See* H.R. Rep. 109-592, at 35; *Legislative Hearing on H.R. 4791, Three Draft Bills, and a Proposed Amendment to H.R. 3082: Hearing before the H. Comm. on Veterans' Affairs, Subcomm. on Economic Opportunity*, 109th Cong. 58 (2006).

employment preferences for veterans, and, in doing so, highlighted that "witnesses graphically pointed out to the Senate Committee what they deemed would be the unfairness of the Act's effect if passed as written." *Id.* at 339. Given that testimony, the Court concluded that "Congress passed the bill with full knowledge that the long standing absolute retention preference of veterans would be embodied in the Act." *Id.*

Here, too, Congress adopted Section 8127(d) with full knowledge that the requirement that contracting officers "*shall* award contracts on the basis of competition restricted to small business concerns owned and controlled by veterans" imposed a mandatory mechanism in contrast to the discretionary standards in subsections (b) and (c). Congress' decision to chart a new course, providing that VA contracting officers "shall award" VA contracts to eligible veterans, reflects Congress' recognition that previous efforts had failed to achieve the desired results, and that stronger measures were necessary.

II. THE MANDATORY PREFERENCE IN SUBSECTION 8127(D) SERVES CONGRESS' GOAL OF INCREASING OPPORTUNITIES FOR VETERAN-OWNED BUSINESSES.

The United States has argued that Section 8127(d) should not be interpreted to impose a mandatory preference for veteran-owned businesses because doing so would "produce significant waste and inefficiency" and "could also create harmful delay." See Brief in Opposition 15-17. The United States continues that "[t]oday, a contracting officer can simply open the FSS website, check the listings, and place an order for such an item," whereas "on

petitioner's view, a contracting officer could not utilize the FSS without first performing market research to assess whether two or more veteran-owned small businesses can provide [an item] at a fair and reasonable price." *Id.* at 16.

The United States' focus on the administrative convenience to contracting officers is misguided. The intent of Congress under Section 8127 was to compel the VA to improve contracting opportunities for veteran-owned small businesses even if doing so might limit the discretion of contracting officers. See 38 U.S.C. § 8127(a)(1). The government's claims of "waste and inefficiency" are overblown, and, in all events, provide no basis for rejecting the mandatory mechanism of Section 8127(d).

A. Congress Sought To Address The Burdens Facing Veterans By Increasing Contracting Opportunities For Veteran-Owned Small Businesses.

1. Veterans' preferences traditionally are "designed to reward veterans for the sacrifice of military service, to ease the transition from military to civilian life, to encourage patriotic service, and to attract loyal and well-disciplined people to [public] service." *Personnel Adm'r of Mass.*, 442 U.S. at 265; *Attorney Gen.* v. *Soto-Lopez*, 476 U.S. 898, 910 (1986) (plurality) ("Compensating veterans for their past sacrifices by providing them with advantages over nonveteran citizens is a long-standing policy of our Federal and State Governments"). The availability of adequate contracting opportunities for veterans and disabled veterans who own small businesses is critically important given the real-world challenges they face as they transition to civilian life.

During their military service, veterans gain significant leadership, management, and technical skills, and pursue educational opportunities, which are ideal preparation for success as entrepreneurs.[4] Nevertheless, among post-9/11 veterans, more than four-in-ten (44%) report that they had difficulties readjusting to civilian life. See Pew Study, *supra*, at 7. More than one-third (37%) say that they have suffered from some form of post-traumatic stress as a result of their experiences in the military, and nearly six-in-ten (58%) say that they have served with someone who did. *Id.* at 53. For veterans with a service-related injury, the transition to civilian life can be particularly challenging. Returning home means not only learning to live with a physical disability, but also the loss of his or her identity as an active member of the armed services.[5]

For all veterans, and especially those who have sustained service-related injuries, obtaining meaningful employment represents one of the best avenues for successfully reintegrating into their communities. See Ansley Testimony, *supra*. Unfortunately, many disabled veterans returning to

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[4] *Cf.* Pew Research Ctr., *The Military-Civilian Gap: War and Sacrifice in the Post-9/11 Era* 7 (2011) (Pew Study), *available at* http://www.pewsocialtrends.org/files/2011/10/veterans-report.pdf (noting that more than nine-in-ten post-9/11 veterans say that serving in the military has given them self-confidence, helped them mature, and taught them how to work with other people; more than seven-in-ten say that their military service helped prepare them for a post-military career).

[5] *See* Heather Ansley, Consortium of Citizens with Disabilities, Written Testimony before the United States Equal Employment Opportunity Commission: Overcoming Barriers to the Employment of Veterans with Disabilities (Nov. 16, 2011) (Ansley Testimony), http://www.eeoc.gov/eeoc/meetings/11-16-11/ansley.cfm.

the civilian workforce in the post-9/11 era have faced significant barriers to employment. According to the most recent Bureau of Labor Statistics data, the overall unemployment rate for disabled veterans is more than 50% higher than the unemployment rate for non-veterans.[6] For severely disabled post-9/11 veterans (*i.e.*, those with a disability rating of 60 percent or higher) the situation is worse as these veterans face an unemployment rate (11.4%) almost twice the rate for non-veterans (6.0%). See Employment Situation of Veterans—2014, *supra*, at tbl.7.

Although returning veterans have many traits that should make them attractive to employers—including discipline, leadership, training, and education—they also may have less civilian work experience than those who have not served in the military. Many veterans who would like to enter the civilian job market have found that non-veteran employers do not always understand the value of military experience or how it translates into civilian life, which limits employment opportunities for veterans. See Ansley Testimony, *supra*. Indeed, due to reliance on a professional, volunteer military, only about 0.5% of the American public has served on active duty at any time since 9/11—the lowest military participation rate since World War II. See Pew Study, *supra*, at 8.

2. The barriers facing veterans extend to government contracting. In a recent study commissioned by the Department of Defense (DOD), the RAND Corporation assessed obstacles to providing full and fair government contracting

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[6] *See* News Release, Bureau of Labor Statistics, U.S. Dep't of Labor, Employment Situation of Veterans—2014 tbl.7 (Mar. 18, 2015), *available at* http://www.bls.gov/news.release/pdf/vet.pdf.

opportunities to veterans.[7] The study revealed a lack of adequate contracting opportunities for veterans and service-disabled veterans.

First, some procurement officials give lower priority to meeting veteran contracting goals than to other small business preferences. See DOD Study, *supra*, at xi, 13. This de-emphasis of veteran contracting is due in part to historical reasons. See *id.* For example, when the Veterans Benefits Act of 2003 became law, it gave contracting officers discretion to set aside certain contracts for small businesses owned by service-disabled veterans. See Pub. L. No. 108-183, tit. III, § 308, 117 Stat. 2651, 2662 (2003) ("[A] contracting officer may award . . . ."). The DOD study found that some contracting officials continued to place a lower priority on contracting with service-disabled veteran-owned small businesses than with other small businesses already favored under other statutes. DOD Study, *supra*, at xi, 13.

Second, some contracting officials are reluctant to award contracts to veteran-owned small businesses because of a perception that such businesses may lack significant experience with federal contracting. See *id.* Accordingly, contracting officers often perceive such veteran-owned businesses to be less-attractive suppliers, since the contracting official may assume that more work and more risk are required to do business with them. See *id.* Similarly, some contracting officials surveyed in the DOD study acknowledged their reluctance to contract with a

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[7] *See* Amy G. Cox & Nancy Y. Moore, *Improving Federal and Department of Defense Use of Service-Disabled Veteran-Owned Businesses* iii (2013) (DOD Study), *available at* http://www.rand.org/content/dam/rand/pubs/research_reports/RR300/RR322/RAND_RR322.pdf.

lesser known company when an incumbent contractor is available, thereby limiting opportunities for newly-formed small businesses owned by veterans. See *id.*

Finally, veteran-owned small businesses routinely struggle with a lack of resources necessary to compete for government contracts. See *id.* at 15. Due to the complexities of preparing bids for federal government contracts, bid and proposal costs for these contracts can be higher than what would be expected for private-sector contracts. The DOD study found that many veteran-owned small businesses were reluctant to bid for a government contract when they believed the contract was likely to go to an incumbent or another established supplier. See *id.*

3. In enacting the small business provisions of Section 8127, Congress sought to improve opportunities for veterans and service-disabled veterans to compete for contracts with the VA. Under the heading "Contracting Goals," Section 8127(a)(1) states that its purpose is "to increase contracting opportunities for small business concerns owned and controlled by veterans and . . . veterans with service-connected disabilities." 38 U.S.C. § 8127(a)(1). And, as relevant here, to meet this goal, "a contracting officer of the [VA] shall award contracts on the basis of competition restricted to small business concerns owned and controlled by veterans." *Id.* § 8127(d).

Not surprisingly, the same statutory goals are reflected in the legislative history of Section 8127. The House of Representatives explained that Section 8127 was intended to "improve the competitive status of small businesses owned by veterans and service-disabled veterans when competing for VA contracts."

H.R. Rep. No. 109-592, at 14.[8] The House Report noted frustration with the efforts by agencies to create contracting opportunities for veterans, and the perceived "culture of indifference or ignorance" among some procurement officials with regard to the need to promote veteran participation in the federal procurement system. *Id.* at 15-16.

Section 8127 was intended to remedy these failings by ensuring that "small businesses owned and controlled by veterans and service-disabled veterans should routinely be granted the primary opportunity to enter into VA procurement contracts, and would encourage other agencies to provide such preferences to veteran and service-disabled veteran owned small businesses." *Id.* at 14-15. The House Report further

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[8] Committee hearings on the legislation highlighted the challenges faced by veterans, the failures of previous legislation, and the importance of increasing opportunities for veterans to compete for government contracts. *See, e.g., H.R. 1773, The Native American Veteran Home Loan Act; H.R. 3082, The Veteran-Owned Small Business Promotion Act of 2005; and Four Draft Bills: Hearing Before the H. Comm. on Veterans Affairs, Subcomm. on Economic Opportunity*, 109th Cong. 11 (2005) (statement of Carl Blake, Paralyzed Veterans of America) (explaining that federal agencies "generally ignore" contracting goals "because they know that no real sanctions can be levied against them"); *id.* at 17 (statement of John K. Lopez, Association for Service Disabled Veterans) (describing H.R. 3082 as a "specified contribution to the continuing obligation of our Nation to rehabilitate those veterans that sacrifice for our Nation's security and prosperity"); *Legislative Hearing on H.R. 4791, Three Draft Bills, and a Proposed Amendment to H.R. 3082: Hearing Before the H. Comm. on Veterans' Affairs, Subcomm. on Economic Opportunity*, 109th Cong. at 27 (statement of Brian E. Lawrence, Disabled American Veterans) ("No other category of business owner has contributed more to our nation or is more deserving of special consideration for federal contract opportunities than disabled veterans").

explained that the 2006 Act was necessary, in part, because prior legislation establishing discretionary goals for contracting by small businesses owned by veterans had failed meaningfully to increase contracting opportunities for these businesses. Indeed, in 2005, just prior to the passage of the Act, total federal agency contracting with such veteran-owned businesses amounted to only 0.605 percent of federal contracting, despite a government-wide goal of 3.0 percent. *Id.* at 15-16.

Section 8127 reflects Congress' intention that the VA would (1) take the lead in removing barriers and improving contracting opportunities for veteran-owned businesses and (2) "set the example among government agencies" with regard to veteran contracting. *Id.* at 16. Put simply, Congress' policy goals in enacting Section 8127 were directed at improving contracting opportunities by veteran-owned small businesses rather than the administrative convenience of contracting officers.

B. The Alleged Burden On Contracting Officers Is Overstated And Does Not Provide A Basis For Ignoring Congressional Intent.

The United States argues that it would unreasonable to interpret subsection (d) as imposing a mandatory mechanism on contracting officers because it would "produce significant waste" and be "markedly less efficient" than simply allowing a contracting officer to "place an order for such an item" without regard to the prospective contractor's veteran status. See Brief in Opposition 15-17. These policy concerns about the burden imposed on contracting officers are overblown and provide no basis for ignoring Congress' goal to increase

contracting opportunities for veteran-owned small businesses.

1. The United States' claims of administrative burden and excessive waste are overstated.

The government has argued that imposition of a mandatory mechanism under Section 8127(d) would require a contracting officer to conduct "market research to assess whether two or more veteran-owned small businesses can provide a griddle at a fair and reasonable price." Brief in Opposition 16. These alleged claims about the burdens of performing "market research" are exaggerated.

At the outset, under Section 8127, the VA is already required to maintain a database of registered, pre-verified small businesses owned by veterans. 38 U.S.C. § 8127(f)(1). This database is known as the VA's *Vendor Information Pages* (VIP), and it is publicly available at http://www.vip.vetbiz.gov. 38 C.F.R. § 74.1; *see also In & Out Valet*, B-411019, 2015 CPD ¶ 128, at n.1 (Comp. Gen. Apr. 15, 2015). The VIP database can be searched by business name, keyword, location, and industry to identify veteran-owned small businesses that might be candidates to compete for a particular contract. Under Section 8127, only veteran and service-disabled veteran owned businesses that are listed in the VIP database are eligible to compete for set-aside contracts. See 38 U.S.C. § 8127(e). As a result, contracting officers need not research whether other veteran-owned sources are available. Indeed, under the VA's procurement regulations, contracting officers already must use the VIP database to conduct market research as part of the procurement planning process. See 48 C.F.R. § 810.001.

Contracting officers have access to numerous other resources to perform the market research required under subsection (d). For example, the VA can choose to post a "Request for Information" or "Source Sought" notice on the government's Federal Business Opportunities website to gauge the interest of veteran-owned small businesses in competing for a particular contract. Indeed, the VA routinely posts such notices on this website for exactly this purpose.[9]

In addition, agencies have discretion in determining the scope of market research that is necessary before deciding whether a contract must be set aside for competition restricted to veteran-owned small businesses. The Government Accountability Office (GAO) has explained that "[t]he requirements of the 2006 VA Act [*i.e.*, Section 8127] do not dictate the use of any particular methodology in assessing the availability of [veteran-owned small businesses] to perform a requirement." *In & Out Valet Co.*, 2015 CPD ¶ 128; *accord Crosstown Courier Serv., Inc.*, B-407404, 2012 CPD ¶ 333 (Comp. Gen. Nov. 30, 2012). Accordingly, a contracting officer's decision whether two or more veteran-owned businesses are likely to bid "is a matter of informed business judgment within the contracting officer's discretion," and the GAO will not disturb the contracting officer's decision "absent a showing that it was unreasonable." *In & Out Valet Co.*, 2015 CPD ¶ 128.[10]

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[9] *See, e.g.*, Dep't of Veterans Affairs, *Doing Business with VA* (2015), *available at* http://www.va.gov/osdbu/docs/DoingBusinessWithVA_ReferenceGuide.pdf (encouraging small businesses to respond to Requests for Information to identify potential vendors).

[10] *Accord Buy Rite Transp.*, B-403729 et al., 2010 CPD ¶ 245 (Comp. Gen. Oct. 15, 2010); *Crosstown Courier Serv., Inc.*, B-410936, 2015 CPD ¶ 107 (Comp. Gen. Mar. 12, 2015).

Further, in practical application, the market research requirement under subsection (d) is flexible and can be satisfied with efforts that are reasonable in relation to the nature of the procurement. For example, in *In & Out Valet Co.*, 2015 CPD ¶ 128, the GAO held that the VA had done reasonable market research before not setting aside a contract for a veteran-owned small business where the contracting officer searched the VIP database to identify potential contractors and then researched the firms' websites to determine whether they performed the required services. See also *Crosstown Courier Servs., Inc.*, 2012 CPD ¶ 333 (holding that VA's market research was reasonable where the contracting officer searched the VIP database for potential veteran-owned contractors); *Buy Rite Transp.*, B-403729 et al., 2010 CPD ¶ 245 (Comp. Gen. Oct. 15, 2010) (holding that the VA's market research was reasonable where the contracting officer searched the VIP database and relied on his knowledge that the VA had received bids from veteran-owned small businesses in response to a related procurement).[11]

Given the existing tools at the VA's disposal, the flexibility of Section 8127 regarding the type and degree of market research that is necessary, and the GAO's deference to the business judgment of the contracting officer in determining what type of

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[11] *See also FlowSense, LLC*, B-310904, 2008 CPD ¶ 56 (Comp. Gen. Mar. 10, 2008) (holding that market research was reasonable where the contracting officer searched the VIP database and other available databases to assess whether multiple small businesses owned by service-disabled veterans were likely to bid); *Crosstown Courier Serv., Inc.*, 2015 CPD ¶ 107 (holding that market research was reasonable where the contracting officer searched the VIP database, the General Services Administration website, and a Small Business Administration database).

market research is necessary for each procurement, there is no merit to the government's assertion that it would be unduly burdensome or inefficient for the VA to comply with subsection (d) as written.

Finally, application of Section 8127(d) in accordance with its terms would not result in "significant waste." Brief in Opposition 15. Section 8127(d) requires contracting officers to award contracts to small businesses owned by veterans only if "the award can be made at a fair and reasonable price that offers best value to the United States." 38 U.S.C. § 8127(d); see also 48 C.F.R. § 819.7005(c) (authorizing the contracting officer to cancel the set-aside requirement where the prices that are actually offered are not reasonable). See, e.g., *Crosstown Courier Serv., Inc.*, 2015 CPD ¶ 107 (sustaining VA decision not to set aside contract where pricing received from veteran-owned small business for similar procurement resulted in bids that were between 212% and 163% higher than the VA's estimate of fair market value for the services). Accordingly, there is no merit to the government's suggestion that providing fair contracting opportunities for veterans in all procurements, as required by subsection (d), would be wasteful or harmful to the public fisc. See Brief in Opposition 15-16.

2. The government's complaints about the alleged burdens imposed on contracting officers are, in all events, irrelevant in this proceeding.

In enacting Section 8127(d), Congress determined that improving contracting opportunities for veterans—including service-disabled veterans—was an important national policy goal, which outweighed any additional administrative requirements that would be placed on the VA. To the extent that the

United States believes that Congress made the wrong policy choice, that policy argument is best directed to Congress, not the Court. See *Hilton*, 334 U.S. at 339 (upholding veteran employment preference and explaining that the Court's "responsibility is to interpret the Act, not to overrule the congressional policy").

In enacting legislation, Congress often faces a difficult task of balancing the disparate interests of different parties, including those of the government. See, *e.g.*, *United States* v. *Gilman*, 347 U.S. 507, 511-12 (1954) ("[Congress's] selection of that policy which is most advantageous to the whole involves a host of considerations that must be weighed and appraised."). In so doing, Congress appropriately may adopt a policy that imposes new obligations on an executive agency to achieve an important policy goal. See, *e.g.*, *Consumer Prod. Safety Comm'n* v. *GTE Sylvania, Inc.*, 447 U.S. 102, 123 (1980) ("[A]ny increased burdens imposed on the [agency] as a result of its compliance with [the statute] were intended by Congress in striking an appropriate balance between the interests of [the stakeholders]."); *Bowsher* v. *Merck & Co.*, 460 U.S. 824, 843 (1983) ("[A]ny impediment that our holding places in the path of the [government] is one that Congress chose to adopt.").

Where Congress has enacted legislation that balances competing policy interests, it is not for a federal agency or a federal court to substitute its judgment for that of Congress. See *Salazar* v. *Buono*, 559 U.S. 700, 717 (2010) (plurality) ("Congress's prerogative to balance opposing interests and its institutional competence to do so provide one of the principal reasons for deference to its policy determinations."); *accord Eldred* v. *Ashcroft*, 537 U.S.

186, 208 (2003). Indeed, this Court has routinely rejected arguments by agencies that compliance with a congressional mandate would be unduly burdensome or that a different policy would be more desirable. See, *e.g.*, *MCI Telecomm. Corp.* v. *AT&T*, 512 U.S. 218, 234 (1994) ("[O]ur estimations, and the [government's] estimations, of desirable policy cannot alter the meaning of the [statute]."); *Harrison* v. *PPG Indus., Inc.*, 446 U.S. 578, 593 (1980) (holding that the Court's role was to "determine what Congress intended" in the statute, notwithstanding the government's argument that a different policy would be more efficient); *Consumer Prod. Safety Comm'n*, 447 U.S. at 123 ("[P]etitioner's claim that . . . compliance with the requirements of [the statute] will impose undue burdens on the Commission is properly addressed to Congress, not to this Court.").

As discussed above, the natural reading of the language of Section 8127(d) requires the VA to award contracts to veteran-owned businesses "if the contracting officer has a reasonable expectation that two or more small business concerns owned and controlled by veterans will submit offers and that the award can be made at a fair and reasonable price that offers best value to the United States." 38 U.S.C. § 8127(d). Congress imposed this mandatory mechanism based on its desire to increase contracting opportunities for small veteran-owned businesses. *Id.* § 8127(a)(1). In so doing, Congress was aware that increasing veteran contracting opportunities would impose additional administrative responsibilities on the agency, see H.R. Rep. No. 109-592, at 16-17; however, Congress determined that the need to honor the service of veterans and assist in their transition to civilian life was a national priority, which justified the mandatory preference in Section

8127(d). See *Hilton*, 334 U.S. at 339 ("Congress passed the bill with full knowledge that the long standing absolute retention preferences of veterans would be embodied in the Act").

To the extent that the VA believes the set-aside requirement may be "less efficient," it is nonetheless required to comply with the congressional mandate until Congress directs otherwise. See *Manhattan Gen. Equip. Co.* v. *Comm'r*, 297 U.S. 129, 134 (1936); *FDA* v. *Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 125 (2000) If the VA believes that subsection (d) should be changed to provide additional discretion to contracting officers, that policy view is best directed to Congress rather than the Court. See, *e.g.*, *Bowsher*, 460 U.S. at 843 ("[A]ny arguments that this situation should be changed must be addressed to Congress, not the courts."); *Radzanower* v. *Touche Ross & Co.*, 426 U.S. 148, 156 n.12 (1976) (holding that the government's "policy arguments" were "more appropriately addressed to Congress than to this Court.").

CONCLUSION

For these reasons, the judgment of the Federal Circuit should be reversed.

Respectfully submitted,

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